U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 11 March 2005

BALCA Case Nos.: 2004-INA-2, 2004-INA-42
ETA Case Nos.: P2001-CA-09510399/LA, P2001-CA-09510425/LA

In the Matters of:

COTTONWOOD HOME,
Employer,

on behalf of

CORAZON MEDINA,

and

MARIO REGALADO,
Aliens.

Before: Burke, Chapman, Huddleston, Wood and Vittone
Administrative Law Judges

ORDER OF REMAND

The Certifying Officer's ("CO") denials of labor certification in the above-captioned matters were affirmed by a panel decision of the Board on December 20, 2004. Subsequently, the Employer and the Aliens filed a *pro se* petition for *en banc* review. Upon review of the petition and the Appeal File in this matter, we conclude that the panel decision was inconsistent with *Ronald J. O'Mara*, 1996-INA-113 (Dec. 11, 1997) (*en banc*), in which the Board affirmed the principle that an employer must be given the opportunity to attempt to establish the business necessity for a job requirement and, if unsuccessful, readvertise the position provided that the employer unequivocally agreed in the rebuttal response to readvertise in accordance with the requirements set forth by the

CO in the NOF if the business necessity argument failed to convince the CO. Because the panel's decision was clearly erroneous, we reverse and remand without ordering *en banc* briefing in this matter.

BACKGROUND

The CO's Notice of Findings in this matter proposed to deny labor certification based on two unduly restrictive job requirements: a live-in requirement and a combination of duties requirement. (AF 133-138).

The Notice of Findings ("NOF") provided two corrective options for the live-in requirement: (1) delete and readvertise or (2) establish business necessity.

The NOF provided three corrective options for the combination of duties requirement: (1) delete and readvertise or (2) establish business necessity or (3) show that it is a normal and customary requirement for the job.

The options for corrective action in the NOFs were presented as either/or propositions. A supplemental NOF presented similarly limited corrective paths. (AF 59-61).

In rebuttal, the Employer opted to delete the live-in requirement, but to try to establish that the combination of duties was normal and customary. (AF 22-23). The Final Determination was based on failure to establish that the combination of duties was normal and customary. (AF 14-16). The BALCA panel affirmed that finding, and found that the Employer's subsequent offer to readvertise was not timely presented.

This fact scenario is different from *O'Mara* in that the Employer did not make an unequivocal offer in the rebuttal to readvertise if the CO did not accept its argument that the combination of duties was normal and customary. Nonetheless, it is clear from the record that the NOF and supplementary NOF were written in such a way as to require the

Employer to choose either to delete and readvertise or justify the business necessity/show that the requirement was normal and customary. It did not give the Employer any options.

In *O'Mara*, the Board wrote:

> The CO contends that in the context of §656.25(c)(3) cure or rebut are mutually exclusive alternatives. This is not correct. We find that they are sequential alternatives. In *H.C. Lamarche, Ent., Inc*, 87-INA-607 (Oct. 27, 1988) (*en banc*), the Board found a good faith requirement implicit in the regulations. In the case at bench construing cure or rebut to be sequential alternatives is consonant with the propositions that the due process clause encompasses a guarantee of fair procedure (*Zinermon v. Burch*, 494 U.S. 1 13,125 (1990)) and administrative convenience or necessity cannot override the requirements of due process (*Platex Corp. v. Massinghoff*, 771 F.2d 480, 483 (Fed Cir. 1985).

The principle underlying *O'Mara* is improperly circumvented by the CO where the NOF is written in such in a way so as to preclude the employer from agreeing to delete the restrictive requirement and readvertise if its business necessity argument is not accepted by the CO.

Upon review of the record, we affirm the panel's holding that the Employer failed to establish that the combination of duties was not an unduly restrictive job requirement. We, however, **REMAND** these applications to give the Employer an opportunity to readvertise without the restrictive requirements.

SO ORDERED.

For the Board:

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JOHN M. VITTONE
Chief Administrative Law Judge